

1 John V. Picone III, Bar No. 187226
jpicone@hopkinscarley.com
2 Jeffrey M. Ratinoff, Bar No. 197241
jratinoff@hopkinscarley.com
3 Cary Chien, Bar No. 274078
cchien@hopkinscarley.com
4 HOPKINS & CARLEY
A Law Corporation
5 The Letitia Building
70 South First Street
6 San Jose, CA 95113-2406

7 ***mailing address:***

P.O. Box 1469
8 San Jose, CA 95109-1469
Telephone: (408) 286-9800
9 Facsimile: (408) 998-4790

10 Attorneys for Plaintiff
NEO4J, INC.

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 NEO4J, INC., a Delaware corporation,

15 Plaintiff,

16 v.

17 GRAPH FOUNDATION, INC., an Ohio
18 corporation,

19 Defendant.

CASE NO. 5:19-cv-06226-EJD

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF NEO4J'S MOTION TO
STRIKE**

Date: May 7, 2020
Time: 9:00 a.m.
Location: Courtroom 4, 5th Floor
Judge: Hon. Edward J. Davila

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 Plaintiff Neo4j, Inc. (“Neo4j USA”) hereby submits this Request for Judicial Notice in
3 Support of its Motion to Strike. The documents are attached as Exhibits 3, 5-10 to the
4 *Declaration of Cary Chien in support of Neo4j’s Motion to Strike* filed concurrently herewith.

5 Evidence Code section 452(d) provides that judicial notice may be taken of “[r]ecords of
6 (1) any court of this state or (2) any court of record of the United States or of any state of the
7 United States.” Evidence Code section 453 provides that “[t]he trial court shall take judicial
8 notice of any matter specified in Section 452 if a party requests it and: (a) [g]ives each adverse
9 party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse
10 party to prepare to meet the request; and (b) [f]urnishes the court with sufficient information to
11 enable it to take judicial notice of the matter.”

12 Given the centrality of each exhibit to the allegations in Defendant’s Amended Answer
13 and given that each exhibit’s authenticity is not subject to reasonable dispute, judicial notice is
14 proper under applicable law. Thus, each may be properly considered as part of plaintiff’s Motion
15 to Strike, without converting that motion into one for summary judgment. *Lee v. City of Los*
16 *Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (“[a] court may consider “material which is properly
17 submitted as part of the complaint” on a motion to dismiss without converting the motion to
18 dismiss into a motion for summary judgment.”). Consideration of these exhibits fits squarely
19 within the Ninth Circuit’s precedent for judicial notice, and it is consistent with the consideration
20 given by many other courts to similar documents when evaluating such a motion. Neo4j USA
21 respectfully submits this Request for Judicial Notice for the following documents:

22 1. GitHub Terms of Service from “[https://help.github.com/en/articles/github-terms-](https://help.github.com/en/articles/github-terms-of-service)
23 of-service”, a true and correct copy of which is attached as **Exhibit 3** to the Declaration of Cary
24 Chien in Support of Neo4j’s Motion to Strike (“the Chien Declaration”). *Parrino v. FHP, Inc.*,
25 146 F.3d 699, 703 (9th Cir. 1998), as amended (July 28, 1998) (a motion to dismiss may consider
26 a document whose contents are alleged in the complaint and whose authenticity is undisputed but
27 which is not physically attached to complaint); *see Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th
28

1 Cir. 2002); *Branch v. Tunnell*, 14 F.3d 449, 453–54 (9th Cir. 1994), overruled on other grounds
 2 by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (holding even if a
 3 document is not attached to a complaint, it may be incorporated by reference into a complaint if
 4 the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s
 5 claim.). This document, downloaded from the same link referenced and relied upon by Defendant
 6 for its Fifth Affirmative Defense in its Amended Answer, contains facts which are not subject to
 7 reasonable dispute and capable of accurate and ready determination.

8 2. GNU Affero General Public License published by Free Software Foundation from
 9 GNU website (URL: <http://www.gnu.org>), a true and correct copy of which is attached as
 10 **Exhibit 9** to the Chien Declaration. *Id*; see also *Wible v. Aetna Life Ins. Co.*, 37 F.Supp.2d 956,
 11 966 (C.D. Cal. 2005) (granting request for judicial notice as to webpages). This document, the
 12 AGPL license, is referenced and relied upon by Defendant and forms the basis of its Fourth
 13 Affirmative Defense for abandonment and contains facts which are not subject to reasonable
 14 dispute and capable of accurate and ready determination. *Galbraith v. County of Santa Clara*,
 15 307 F.3d 1119 (9th Cir. 2002) (holding even if a document is not attached to a complaint, it may
 16 be incorporated by reference into a complaint if the plaintiff refers extensively to the document or
 17 the document forms the basis of the plaintiff’s claim).

18 3. Neo4j’s webpages from Wayback Machine archival website (URL:
 19 <https://archive.org/>) archived on August 23, 2011 and March 26, 2014, a true and correct copy of
 20 which is attached as **Exhibits 5-8** to the Chien Declaration. See *Erickson v. Nebraska Mach. Co.*,
 21 2015 WL 4089849, at *1 (N.D. Cal. July 6, 2015) (“[c]ourts have taken judicial notice of the
 22 contents of web pages available through the Wayback Machine as facts that can be accurately and
 23 readily determined from sources whose accuracy cannot reasonably be questioned”); see also
 24 *U.S. ex. Rel. v. Newport Sensors, Inc.*, 2016 WL 8929246, at *3 (C.D. Cal. May 19, 2016)
 25 (recognizing that “district courts in this circuit have routinely taken judicial notice of content
 26 from the Internet Archive’s Wayback Machine pursuant to this rule, as we do here.” (citations
 27 omitted)). These webpages show use of the NEO4J® mark on August 23, 2011 and March 26,
 28 2014, facts which are not subject to reasonable dispute and capable of accurate and ready

1 determination. As such, the Court may take judicial notice of such filing.

2 4. United State Patent and Trademark Office Registration Certificate for the
 3 “Neo4j®” trademark, Registration No. 4,784,280, a true and correct copy of which is attached as
 4 **Exhibit 4** to the Chien Declaration. Documents issued by the United States Patent and
 5 Trademark Office (USPTO) are in the public record and are not subject to reasonable dispute.
 6 *See Autodesk, Inc. v. Dassault Sys. SolidWorks Corp.*, No. 08-04397, 2008 WL 6742224, at *2
 7 n.1 (N.D. Cal. Dec. 18, 2008) (taking judicial notice of trademark registrations and applications
 8 publicly available on USPTO website) (citing *Hoganas AB v. Dresser Indus., Inc.*, 9 F.3d 948,
 9 954 (Fed. Cir. 1993)). Accordingly, this document is a public record created and issued by the
 10 United States Patent and Trademark office showing the application date of April 30, 2014, a fact
 11 which is not subject to reasonable dispute and capable of accurate and ready determination. As
 12 such, the Court may take judicial notice of such filings.

13 5. Domain registration page from WHOIS Internet domain lookup service for the
 14 website domain <http://www.neo4j.org> showing a domain creation date of June 4, 2006, a true and
 15 correct copy of which is attached as **Exhibit 10** to the Chien Declaration. This document is a
 16 public record created and issued by the WHOIS Lookup Service and contains the registration date
 17 of the website domain, which is not subject to reasonable dispute and capable of accurate and
 18 ready determination. As such, the Court may take judicial notice of this document.

21 Dated: February 7, 2020

HOPKINS & CARLEY
 A Law Corporation

24 By: /s/ Cary Chien

Cary Chien
 Attorney for Plaintiff
 NEO4J, INC.